

# The Status of Victim Impact Statements in Ohio Capital Offense Sentencing

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## I. INTRODUCTION

“[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.”<sup>1</sup>

In order to keep a true balance, justice for the accuser may include the right to tell the criminal story from a victim’s unique perspective. This story may include the consequences that a crime has had on the victim or the victim’s family. This sought-after right—in capital offense cases—is tempered by the U.S. Constitution, as victims’ comments could lead to the imposition of the death penalty in capital offense trials solely because the jury was inflamed.<sup>2</sup> Whether the state should constitutionally be allowed to impose the death penalty against its citizenry is at the forefront of many legal disputes on the question of penalties. Such disputes are further complicated when the law itself is uncertain, either due to unclear language or continuous enacting, amending, or repealing of statutes in a particular area of law. This uncertainty exists with regard to Amended Substitute Senate Bill 186 (hereinafter Victims’ Rights Act).<sup>3</sup>

The Victims’ Rights Act mandates that a victim of crime be permitted to make a victim impact statement (hereinafter VIS) at several points in the criminal justice process. VISs can be made during presentence investigations,<sup>4</sup> sentencing,<sup>5</sup> parole,<sup>6</sup> and furlough hearings.<sup>7</sup> The primary focus of this Note shall be the statutory requirement that the courts must allow the victim of a crime to make a VIS just before the imposition of a sentence, and that the VIS

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<sup>1</sup> *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (Justice Cardozo’s view was reaffirmed in *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

<sup>2</sup> *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). A jury’s discretion to impose the ultimate penalty of death must be “suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.” *Id.* The *Gregg* Court recognized the mandates established in *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*), regarding death sentencing. *Id.*

<sup>3</sup> S. 186, 120th General Assembly, Reg. Sess. (1994).

<sup>4</sup> OHIO REV. CODE ANN. § 2930.13(B) (Baldwin 1994).

<sup>5</sup> *Id.* § 2930.14(A).

<sup>6</sup> *Id.* § 2967.12(B)(1).

<sup>7</sup> *Id.* § 2967.27(A)(2).

must be considered in sentencing.<sup>8</sup> The VIS may include a description of the effects of the crime on the victim, the circumstances surrounding the crime, and the manner in which the crime was committed.<sup>9</sup> VISs do not unfairly prejudice defendants in noncapital criminal sentencing hearings because impartial and experienced judges impose sentences. However, VISs may be more likely to have unfair and adverse effects in capital offense sentencing hearings because these hearings are heard by juries<sup>10</sup> that recommend either life imprisonment or the death penalty.<sup>11</sup> VISs have the potential to seriously affect

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<sup>8</sup> *Id.* § 2930.14. This section states:

(A) Before imposing sentence upon the defendant for the commission of a crime, the court shall permit the victim of the crime to make a statement concerning the effects of the crime upon the victim, the circumstances surrounding the crime, and the manner in which the crime was perpetrated. At the judge's option, the victim may present the statement in writing prior to the sentencing hearing, orally at the hearing, or both. . . .

(B) The court shall consider the victim's statement along with other factors that the court is required to consider in imposing sentence. If the statement includes new material facts upon which the court intends to rely, the court shall continue the sentencing proceeding or take other appropriate action to allow the defendant an adequate opportunity to respond to the new material facts.

*Id.*

<sup>9</sup> *Id.* § 2930.14(A).

<sup>10</sup> Sentence can be imposed by a panel of three judges that tried the offender if the defendant waived the right to trial by jury or by the trial jury and the trial judge if the defendant was tried by a jury. *Id.* § 2929.03(C)(2)(a)-(b).

<sup>11</sup> *Id.* § 2929.03(C)(2). The defendant must first be found guilty of both the charge and one or more specifications of aggravating circumstances listed in § 2929.04(A) of the Ohio Revised Code (hereinafter O.R.C.). *Id.* The list of aggravating circumstances in O.R.C. § 2929.04(A) are as follows:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. . . .

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility. . . .

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to

jurors, especially when spoken or written by articulate, persuasive individuals.<sup>12</sup> These serious effects are exacerbated when the trial jury has been exposed to grotesque evidence and is subsequently seated as the sentencing jury.<sup>13</sup> Despite these serious effects, the Victims' Rights Act won approval by the Ohio General Assembly.<sup>14</sup> With the passage of the Victims' Rights Act came uncertainty as to whether VISs were admissible in Ohio capital offense sentencing hearings. The uncertainty arose because the Victims' Rights Act repealed prior legislation excepting VISs from capital offense sentencing hearings but the new Act never explicitly allowed VISs in capital offense

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kill two or more persons by the offender.

(6) The victim of the offense was a peace officer . . . whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

*Id.* § 2929.04(A). The trial jury, if the defendant was tried by a jury, must then unanimously find, by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors present in the case. *Id.* § 2929.03(D)(2). If so, the jury will recommend to the court that the defendant receive the death sentence. *Id.* If the aggravating circumstances do not outweigh the mitigating factors present in the case, the trial jury will recommend life imprisonment with parole eligibility after either twenty or thirty full years of imprisonment. *Id.*

<sup>12</sup> *Booth v. Maryland*, 482 U.S. 496, 505 (1987), *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991). In *Booth*, the Court stated that while one victim's family members may be articulate and persuasive in expressing their loss, other victims may leave behind no family or family members who are less able to express their loss in such eloquent terms. *Id.* The fact that a jury may decide to impose death due to the persuasiveness of a victim's family illustrates the dangers of VISs in the sentencing phase of capital offense cases. *Id.*

<sup>13</sup> OHIO REV. CODE ANN. § 2929.03(C)(2)(b) (Baldwin 1994); *see supra* text accompanying note 10.

<sup>14</sup> *See infra* note 19.

sentencing hearings. Instead, the Victims' Rights Act was silent on this specific issue.

This Note covers four areas surrounding the VIS controversy. Part II discusses the history of the Victims' Rights Act. It discusses the enactment, amendment, and repeal of Ohio statutes which form the core and track the cause of the current statutory uncertainty. Part III provides a historical judicial context within which the Victims' Rights Act must be viewed. This Part provides judicial context by concentrating on three U.S. Supreme Court decisions essential to an understanding of the law surrounding VISs. These decisions are: *Booth v. Maryland*,<sup>15</sup> *South Carolina v. Gathers*,<sup>16</sup> and *Payne v. Tennessee*.<sup>17</sup> Part IV provides arguments for and against allowing VISs during the sentencing phase of capital offense cases.<sup>18</sup> Finally, Part V discusses my conclusions as to how Ohio law should be interpreted.

## II. HISTORY AND CONTROVERSY OF AMENDED SUBSTITUTE SENATE BILL 186

In response to the rise in victims' rights awareness, Ohio passed the Victims' Rights Act.<sup>19</sup> This Act amended current victims' rights law, repealed other sections of the Ohio Revised Code (hereinafter O.R.C.) which codified victims' rights, and enacted new sections on victims' rights to the O.R.C.<sup>20</sup> Those sections repealed by the Victims' Rights Act comprise the core of the Ohio controversy. Specifically, the Victims' Rights Act repealed O.R.C. sections 2943.041 and 2945.07.<sup>21</sup> These two sections excepted capital offense cases from sentencing hearings in which a VIS could be read, but allowed VISs in other sentencing hearings.<sup>22</sup> With these two sections repealed, the capital

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<sup>15</sup> 482 U.S. 496 (1987), *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991).

<sup>16</sup> 490 U.S. 805 (1989), *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991).

<sup>17</sup> 501 U.S. 808 (1991).

<sup>18</sup> For a discussion of arguments against admitting VISs in capital offense sentencing hearings, see *infra* part IV.A. For a discussion of arguments in support of admitting VISs in capital offense sentencing hearings, see *infra* part IV.B.

<sup>19</sup> See S. 186, 120th General Assembly, Reg. Sess. (1994). The Victims' Rights Act was passed on May 26, 1994 and approved on July 13, 1994. Its effective date was October 12, 1994.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* sec. 2.

<sup>22</sup> OHIO REV. CODE ANN. §§ 2943.041, 2945.07 (Baldwin 1993) (repealed 1994). Both sections stated that a victim impact statement was permitted in the following cases:

[T]he indictment or count in the indictment does *not* contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised

offense exception arguably no longer existed since the General Assembly did not include any similar exception in the Victims' Rights Act.

However, the General Assembly did not specifically include capital offense sentencing juries as proper audiences for VISs. Notwithstanding this omission, O.R.C. section 2930.14(B) states that "[t]he court *shall* consider the victim's statement" before imposing sentence.<sup>23</sup> Further, the language of O.R.C. section 2930.14(B) indicates that the judge, not the jury, should receive victim impact evidence.<sup>24</sup> Because sentencing juries would receive victim impact evidence in capital offense sentencing hearings, a practice apparently prohibited by the language of O.R.C. section 2930.14(B), admitting VISs may be improper in light of the recent amendments. Given the attention and recent focus on the arguments surrounding VISs,<sup>25</sup> it is unlikely that the General Assembly merely overlooked the issue of VISs in capital offense cases. A more plausible interpretation is that the General Assembly was not explicit enough in its decision to affirmatively admit such evidence.

### III. COMMON LAW HISTORY OF VICTIM IMPACT STATEMENTS

#### A. U.S. Supreme Court Opposes Victim Impact Statements at Capital Offense Hearings

The history of VISs during the sentencing phase of capital offenses has been uncertain and controversial. The U.S. Supreme Court has done little to alleviate the uncertainty surrounding VISs. To the contrary, the Court handed down three different decisions within four years on the status of VISs.<sup>26</sup>

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Code . . . or a violation of an existing or former municipal ordinance or law of this or any other state or the United States in situations in which the violation is substantially equivalent to any of those violations . . . .

*Id.* (emphasis added). Division (A) of § 2929.04 of the O.R.C. lists the aggravating circumstances of which one or more must be specified in the indictment and proved beyond a reasonable doubt before a sentencing jury can recommend, or a judge impose, the death sentence for a capital offense. *Id.* § 2929.04. See *supra* note 11 for the list of aggravating circumstances.

<sup>23</sup> OHIO REV. CODE ANN. § 2930.14(B) (Baldwin 1994) (emphasis added); see *supra* note 8.

<sup>24</sup> OHIO REV. CODE ANN. § 2930.14(B) (Baldwin 1994).

<sup>25</sup> "[T]hat a crime's unanticipated consequences must be deemed 'irrelevant' to the sentence conflicts with a public sense of justice keen enough that it has found voice in a nationwide 'victim's rights' movement." *Payne v. Tennessee*, 501 U.S. 808, 834 (1991).

<sup>26</sup> *Booth v. Maryland*, 482 U.S. 496 (1987), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991); *South Carolina v. Gathers*, 490 U.S. 805 (1989), *overruled by Payne v.*

The first of these three pivotal decisions, *Booth v. Maryland*,<sup>27</sup> held that allowing a VIS at the sentencing phase of a capital murder trial violated the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>28</sup> The defendant in *Booth* robbed and murdered an elderly couple.<sup>29</sup> The defendant was convicted on two counts of first-degree murder, two counts of robbery, and one count of conspiracy to commit robbery.<sup>30</sup> Defendant Booth chose to have his sentence determined by the trial jury instead of the judge.<sup>31</sup> Before sentencing, a presentence investigation report was completed on Booth.<sup>32</sup> In compliance with a Maryland statute, a VIS was included in the presentence investigation report.<sup>33</sup> The VIS described the severe emotional impact the crimes had on the victims' family and the personal characteristics of the victims.<sup>34</sup> The VIS also stated the family members' opinions of the crimes and of the defendant.<sup>35</sup> For instance, the victims' son stated that he "suffers from lack of sleep and depression, and is 'fearful for the first time in his life.'"<sup>36</sup> He also stated that his parents were "'butchered like animals.'"<sup>37</sup>

In deciding that a VIS was unconstitutional in capital offense sentencing—and after considering the above information in Booth's VIS—the Court stated that a VIS interfered with the jury's ability to make an "individualized determination" of whether the defendant should be executed.<sup>38</sup> The law

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Tennessee, 501 U.S. 808 (1991); *Payne v. Tennessee*, 501 U.S. 808 (1991). For a more extensive discussion of *Booth*, *Gathers*, and *Payne*, see Michael I. Oberlander, Note, *The Payne of Allowing Victim Impact Statements at Capital Sentencing Hearings*, 45 VAND. L. REV. 1621, 1633-44 (1992); Steven P. Smith, Note, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trials*, 93 COLUM. L. REV. 1249, 1256-57 (1993).

<sup>27</sup> 482 U.S. 496 (1987), *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991).

<sup>28</sup> *Id.* at 509. The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

<sup>29</sup> *Booth*, 482 U.S. at 497.

<sup>30</sup> *Id.* at 498.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* The 1986 Maryland statute in relevant part read: "In any case in which the death penalty is requested . . . a presentence investigation, including a victim impact statement, shall be completed by the Division of Parole and Probation, and shall be considered by the court or jury before whom the separate sentencing proceeding is conducted . . . ." MD. CODE ANN., EXEC. DEP'T § 4-609(d) (1986).

<sup>34</sup> *Booth*, 482 U.S. at 502.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 499-500.

<sup>37</sup> *Id.* at 500.

<sup>38</sup> *Id.* at 502 (quoting *Zant v. Stephens*, 462 U.S. 862, 879 (1983)) (emphasis omitted).

required that a determination be based on "the character of the individual and the circumstances of the crime."<sup>39</sup> This determination was jeopardized when victim impact evidence was admitted, because it had the potential of focusing the jury's attention on matters outside the defendant's character and circumstances of the crime.<sup>40</sup> In other words, the jury's attention might be focused on matters extraneous to the "blameworthiness" of the defendant.<sup>41</sup> For example, often the defendant does not know the victim.<sup>42</sup> The defendant, therefore, does not know of any consequences to the victim's family and should not be sentenced to death based on factors irrelevant to the decision to kill.<sup>43</sup> A jury's discretion to impose the death sentence must be "directed and limited so as to minimize the risk of wholly arbitrary and capricious action."<sup>44</sup> Only then can a death sentence be within the bounds of the Constitution and the Eighth Amendment. The victim impact information in *Booth*, however, tended to inflame the jury and divert the jury's attention to the victims and their families rather than concentrate on the crime and the defendant.<sup>45</sup> Due to this tendency to incite the jury by recounting the grief of the victims, the jury was unable to make an individualized determination of whether the defendant should be executed for his capital offense.<sup>46</sup> The *Booth* Court also expressed concern that a sentencing jury would recommend death based on the perceived worth of the victim.<sup>47</sup> Victim impact evidence often contains information about the personal

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<sup>39</sup> *Id.* (quoting *Zant v. Stephens*, 462 U.S. 862, 879 (1983)).

<sup>40</sup> *Id.* at 504.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 502 (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976)). *Gregg* incorporated the mandates of *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), into its death penalty statute so as to pass constitutional scrutiny. *Gregg*, 428 U.S. at 199, 207. *Furman* struck down Georgia's death penalty statute and effectively invalidated death penalty statutes throughout the United States. *Furman*, 408 U.S. at 411 (Blackmun, J., dissenting). In *Furman*, Justice Stewart stated that, though not per se unconstitutional, a death sentence could be handed down in such a manner that makes it unconstitutional. He likened arbitrary and capricious death sentence decisions to being struck by lightning. *Id.* at 309-10 (Stewart, J., concurring). Of all the susceptible individuals, only a random handful are selected. *Id.* This makes being struck by lightning and arbitrary and capricious death sentences both cruel and unusual. *Furman* mandated that state capital sentencing procedures be based upon reliable standards that use rational and objective criteria to distinguish between defendants who deserve the death penalty and those who do not. Smith, *supra* note 26, at 1252-53; see *Zant v. Stephens*, 462 U.S. 862, 874 (1983).

<sup>45</sup> *Booth*, 482 U.S. at 508.

<sup>46</sup> See *id.* at 508-09.

<sup>47</sup> See *id.* at 506-07.

qualities of the victim.<sup>48</sup> The Court did not want death imposed more often when the victim was an upstanding member of the community rather than "someone of questionable character."<sup>49</sup> Based on the above reasons, the Court found that the introduction of VISs at the sentencing phase of a capital murder trial violated the Eighth Amendment.<sup>50</sup>

In 1989, the U.S. Supreme Court, in *South Carolina v. Gathers*,<sup>51</sup> expanded its prohibition of VISs to statements by prosecutors regarding the personal qualities of victims.<sup>52</sup> The prosecutor in *Gathers* read from a religious tract the victim was carrying at the time of his death.<sup>53</sup> The prosecutor also commented on the personal qualities of the victim, which were inferred from the items found at the murder scene.<sup>54</sup> The prosecutor then conveyed the suggestion that the defendant deserved the death penalty because he took the life of a religious man and registered voter.<sup>55</sup> Stating that VISs held the same constitutional problems when presented by prosecutors as when presented by a victim's family members, the Court held that victim impact evidence remained unconstitutional.<sup>56</sup> Victim impact evidence maintained this status until 1991 when the Court overruled itself in *Payne v. Tennessee*.<sup>57</sup>

#### B. Current Status of Victim Impact Statements Under *Payne v. Tennessee*

The current status of the law was first articulated in *Payne v. Tennessee*.<sup>58</sup>

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<sup>48</sup> See *id.* The Court discussed the procedural consequences of admitting victim impact evidence. *Id.* at 507. In some cases the defendant would be permitted to "put on evidence that the victim was of dubious moral character, was unpopular, or was ostracized from his family." *Id.* The Court described this as an unappealing "'mini-trial' on the victim's character." *Id.* The Court stated: "We are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions." *Id.* at 506 n.8.

<sup>49</sup> *Id.* at 506.

<sup>50</sup> *Id.* at 509.

<sup>51</sup> 490 U.S. 805 (1989), overruled by *Payne v. Tennessee*, 501 U.S. 808 (1991).

<sup>52</sup> *Id.* at 811.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 810. The victim in *Gathers* was also unemployed, experienced mental problems, and referred to himself as "Reverend Minister" although he had no formal religious training. *Id.* at 807.

<sup>56</sup> *Id.* at 811-12.

<sup>57</sup> 501 U.S. 808, 830 (1991).

<sup>58</sup> *Id.* at 827.



Defendant Payne was convicted by a Tennessee jury on two counts of first-degree murder and one count of assault with intent to commit murder in the first degree.<sup>59</sup> Payne was sentenced to death for each of the murders and to thirty years in prison for the assault.<sup>60</sup> The facts of the case detailed an unprovoked, heinous act of violence on defendant Payne's part.<sup>61</sup> Despite the overwhelming evidence against Payne, he proclaimed his innocence at trial.<sup>62</sup> During the sentencing phase of the trial, Payne presented the testimonies of four witnesses: his mother and father, his girlfriend, and a clinical psychologist specializing in criminal court evaluation work.<sup>63</sup> Their testimonies were intended to mitigate against Payne receiving the death penalty.<sup>64</sup> The first three witnesses testified as to Payne's good character and his good relationship with children.<sup>65</sup> The psychologist testified that Payne was "mentally handicapped" based on a low IQ test score but was neither psychotic nor schizophrenic.<sup>66</sup> Despite the U.S. Supreme Court's earlier rulings in *Booth* and *Gathers*, the trial court allowed a relative of the victims, Mary Zvolanek, to testify at the sentencing hearing.<sup>67</sup> Zvolanek briefly described how her grandson Nicholas, the young survivor of the attack, was affected by the murders of his mother and younger sister.<sup>68</sup> In arguing for the death penalty during closing arguments, the prosecutor extensively commented on the continuing effects of Nicholas's experience.<sup>69</sup>

In its decision to abandon the rationale in *Booth* and *Gathers*, the U.S.

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<sup>59</sup> *Id.* at 811. The charges were based on an attack on a mother and her two children. *Id.* The mother and her daughter were killed, but the son survived. *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *See id.* at 811-13.

<sup>62</sup> *Id.* at 813-14. Payne asserted that another man raced past him as he was walking up the stairs to his girlfriend's apartment. *Id.* at 813. The victims lived across the hall from Payne's girlfriend. *Id.* at 811. Payne stated that he got blood on himself when he tried to help the victims. *Id.* at 813. He then stated that when he heard sirens, he panicked and fled the scene. *Id.* at 811, 813-14.

<sup>63</sup> *Id.* at 814.

<sup>64</sup> *Id.* at 825-27.

<sup>65</sup> *Id.* at 814.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 814-15.

<sup>69</sup> *Id.* at 815. Especially interesting was the tactic the prosecutor used to counter the cruel and unusual argument against the death penalty. *See supra* text accompanying note 44. The prosecutor stated: "You saw the videotape this morning. You saw what Nicholas Christopher will carry in his mind forever. When you talk about cruel, when you talk about atrocious, and when you talk about heinous, that picture will always come into your mind, probably throughout the rest of your lives." *Payne*, 501 U.S. at 815-16.

Supreme Court took a different approach to the "blameworthiness of a defendant" standard which prevented earlier Courts from allowing VISs. The *Payne* Court pointed out that "two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm."<sup>70</sup> Therefore, the Court determined that the amount of harm caused was a crucial ingredient in determining the appropriate punishment.<sup>71</sup> The Court also discussed the importance of conducting an inquiry that was broad in scope.<sup>72</sup> It expressed agreement with earlier case law that a jury should have as much information as possible before making a sentencing decision.<sup>73</sup> The Court concluded that this broad scope included VISs.<sup>74</sup>

One of the Court's strongest arguments, however, was based upon balancing. In an earlier decision, the Court noted that a state could not prevent a sentencing jury from considering "relevant mitigating evidence" that a defendant offered in support of a sentence other than death.<sup>75</sup> This advanced the notion, relied on in *Booth*, that defendants should be treated as individuals with their own set of mitigating factors. However, being treated as an individual, the Court noted, did not imply that a defendant must be considered apart from the crime and the harm he committed.<sup>76</sup> The Court stated that it was this principle which the *Booth* Court erroneously applied.<sup>77</sup> Through the *Booth* interpretation, the scales of justice were unfairly weighted in favor of the

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<sup>70</sup> *Payne*, 501 U.S. at 819. The example the Court gave was: "If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater." *Id.* at 819 (quoting *Booth v. Maryland*, 482 U.S. 496, 519 (1987) (Scalia, J., dissenting), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991)). In her dissenting opinion in *Gathers*, Justice O'Connor noted that no state authorizes the death penalty for attempted murder, though a defendant convicted of attempted murder has the same mental state as an actual killer. *South Carolina v. Gathers*, 490 U.S. 805, 819 (1989) (O'Connor, J., dissenting), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991). The only difference between the two crimes is the harm to the community. *Id.*

<sup>71</sup> *Payne*, 501 U.S. at 819.

<sup>72</sup> *Id.* at 820-21.

<sup>73</sup> *Id.* at 821. The Court agreed with the holding of *Gregg v. Georgia*, 428 U.S. 153, 203-04 (1976), which upheld Georgia's lack of restrictions on evidence at presentence hearings. *Gregg*, 428 U.S. at 203. The *Gregg* Court thought it was wise to allow open and far-ranging argument so that the jury could have as much information as possible when making the sentencing decision. *Id.* at 203-04.

<sup>74</sup> *See Payne*, 501 U.S. at 827.

<sup>75</sup> *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982).

<sup>76</sup> *Payne*, 501 U.S. at 822.

<sup>77</sup> *Id.*

defendant.<sup>78</sup> While minimal limitations were placed on a defendant's right to present relevant mitigating evidence,<sup>79</sup> the state was prohibited from showing the consequences of a defendant's act.<sup>80</sup> This relevant mitigating evidence could include a defendant's family or friends testifying as to a defendant's good character, position in the community, or role in the family unit.<sup>81</sup> This type of evidence is similar to evidence brought by a victim's family describing the victim's character, position in the community, role in the family unit, and in what ways the victim will be missed. Both are equally relevant or irrelevant. Since one is admissible, the Court reasoned that the other should be admissible as well.<sup>82</sup>

In response to the *Booth* Court's concern as to whether sentences would be imposed according to the community fitness of the victim, the Court stated that the purpose of VISS was not for comparative judgements.<sup>83</sup> Instead, just as

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<sup>78</sup> *Id.*

<sup>79</sup> O.R.C. § 2929.03 discusses mitigating circumstances. In relevant part it states: "The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death." OHIO REV. CODE ANN. § 2929.03(D)(1) (Baldwin 1994). The mitigating factors of O.R.C. § 2929.04(B) include the following:

(B) [T]he nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

*Id.* § 2929.04(B).

<sup>80</sup> *Payne*, 501 U.S. at 822.

<sup>81</sup> *See id.* at 814.

<sup>82</sup> *Id.* at 826 (citing *State v. Payne*, 791 S.W.2d 10, 19 (Tenn. 1990), *aff'd*, *Payne v. Tennessee*, 501 U.S. 808 (1991)).

<sup>83</sup> *Id.* at 823.

each defendant must be treated as a unique individual, each victim should be treated as a unique individual.<sup>84</sup> For example, even though the victim in *Gathers* was both unemployed and experiencing mental problems at the time of his death, his murderer was originally sentenced to death.<sup>85</sup> This illustrates that the place a victim holds in society is not always determinative as to whether a defendant will receive the death penalty. The *Payne* Court held that if a state chose to admit victim impact evidence, the Eighth Amendment erected no per se bar to its admission.<sup>86</sup> The Court then extended its decision by allowing prosecutorial argument on victim impact evidence, thereby overruling *Gathers*.<sup>87</sup>

#### IV. INTERPRETATIONS OF THE VICTIMS' RIGHTS ACT

##### A. Victim Impact Statements Prohibited by Ohio Law

Opponents to admitting VISs at capital offense sentencing hearings assert that VISs are still prohibited by Ohio law. Specifically, these opponents assert that the recently enacted Victims' Rights Act does nothing to change prior law as to whether VISs can be read to juries during sentencing of capital offenses. This position is supported by three arguments: (1) current law does not specifically allow VISs;<sup>88</sup> (2) the mandatory language of the Victims' Rights Act conflicts with Rule 403 of the Ohio Rules of Evidence;<sup>89</sup> and (3) *Payne* does not act as a barrier to prohibit victim impact evidence.<sup>90</sup>

##### 1. Current Law Does Not Specifically Allow VISs

The first argument against admitting VISs at capital offense sentencing hearings is that current law does not specifically allow VISs at capital sentencing hearings.<sup>91</sup> Although the statutes containing capital sentencing exceptions to VISs were repealed,<sup>92</sup> nowhere does the Victims' Rights Act

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<sup>84</sup> *See id.*

<sup>85</sup> *South Carolina v. Gathers*, 490 U.S. 805, 806 (1989). This sentence was then reversed by the U.S. Supreme Court and the case was remanded for a new sentencing hearing. *Id.* at 805.

<sup>86</sup> *Payne*, 501 U.S. at 827.

<sup>87</sup> *Id.* at 830.

<sup>88</sup> For further discussion, see *infra* part IV.A.1.

<sup>89</sup> For further discussion, see *infra* part IV.A.2.

<sup>90</sup> For further discussion, see *infra* part IV.A.3.

<sup>91</sup> *See* OHIO REV. CODE ANN. § 2930.14 (Baldwin 1994).

<sup>92</sup> *Id.* §§ 2943.041, 2945.07 (Baldwin 1993) (repealed 1994).

specifically allow VISs to be read during capital sentencing hearings.<sup>93</sup> This omission of the exception could mean that the General Assembly did not intend VISs to be read during the sentencing of capital offenses. However, the General Assembly simply may have overlooked including the exception in the new legislation. Although unlikely, the proposition that the exception was inadvertently omitted is strengthened by a close reading of the Victims' Rights Act.

O.R.C. section 2930.14, a newly enacted statute through the Victims' Rights Act,<sup>94</sup> refers solely to "victims"—not to victims' family members<sup>95</sup>—making a statement concerning the crime. On the surface, two interpretations of this language seem to warrant the use of VISs during the sentencing of capital offenses without offending the language of O.R.C. section 2930.14. However, closer scrutiny of these two interpretations show that a capital offense victim was never the intended beneficiary of this legislation. In the first interpretation, the victim could physically deliver the statement either in writing or orally at the actual hearing.<sup>96</sup> However, this would be impossible in the case of capital offense sentencing hearings as the victim is deceased. In the second interpretation, the victim referred to in O.R.C. section 2930.14 could also, by definition, include a victim's representative.<sup>97</sup> This would allow the victim's representative to present the VIS to the court and, arguably, to a sentencing jury. The victim's representative could be a family member or any other person who wishes to exercise the rights of the victim.<sup>98</sup> A VIS at a capital sentencing hearing will often contain the statements of several individuals; and be presented by a single victim's representative.<sup>99</sup> Although a victim's representative could incorporate the statements of other family members in her single VIS, such a compilation would not comply with O.R.C.

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<sup>93</sup> See *id.* § 2930.14 (Baldwin 1994).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* § 2930.14(A); see *supra* note 8.

<sup>96</sup> OHIO REV. CODE ANN. § 2930.14(A) (Baldwin 1994).

<sup>97</sup> *Id.* § 2930.02(A)(1). This section states:

(A)(1) A member of a victim's family or another person may exercise the rights of the victim under this chapter as the victim's representative if either of the following applies:

(a) The victim is a minor or is incapacitated, incompetent, or deceased.

*Id.* This section also specifies that all references to a victim under chapter 29 shall be interpreted as references to a victim's representative if one is so appointed. *Id.* § 2930.02(B).

<sup>98</sup> *Id.* § 2930.02(A)(1).

<sup>99</sup> *Id.* § 2930.02(A)(2). If more than one individual wishes to be the victim's representative, the court may designate one person to fulfill that charge. *Id.*

section 2930.14(A).<sup>100</sup> O.R.C. section 2930.14(A) allows a "statement concerning the effects of the crime *upon the victim . . .*"<sup>101</sup> Although this could be expanded to include the effects of the crime upon the victim's representative (because a victim's representative stands in the shoes of the victim), it could not be expanded to include other family members or friends.<sup>102</sup> Because the effects of a crime upon various family members and friends is not statutorily permitted in the VIS, and the capital offense VIS contains such impermissible effects, it is arguable that the General Assembly did not intend to allow VISs at capital sentencing hearings.

## 2. *The Mandatory Language of the Victims' Rights Act Conflicts with Rule 403 of the Ohio Rules of Evidence*

The second argument against admitting VISs at capital sentencing hearings is that the mandatory language of the Victims' Rights Act could be read to conflict with Rule 403 of the Ohio Rules of Evidence. O.R.C. section 2930.14(A) states: "Before imposing sentence upon the defendant for the commission of a crime, the court *shall* permit the victim of the crime to make a statement . . ."<sup>103</sup> This wording makes it mandatory for a court to permit victim impact evidence if the victim or victim's representative desires to present it at the sentencing hearing. This causes a potential conflict with the Ohio Rules of Evidence. Rule 403(A) states: "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."<sup>104</sup> Although the *Payne* Court held that VISs were not per se unconstitutional,<sup>105</sup> it did not hold that such evidence was always admissible, regardless of any prejudicial effect. If the General Assembly in enacting O.R.C. section 2930.14 intended to admit all VISs during capital sentencing, the rules of evidence may be usurped. Practically, this would not be a problem in any sentencing procedure other than a capital sentencing procedure because the judge is wholly responsible for the defendant's sentence. Due to experience, the judge would not allow the VIS to unfairly prejudice his or her decision. However, this is not the situation in sentencing hearings with death specifications. When a case has death specifications, a sentencing jury will recommend either life imprisonment

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<sup>100</sup> *Id.* § 2930.14(A); *see supra* notes 8 and 99.

<sup>101</sup> OHIO REV. CODE ANN. § 2930.14(A) (Baldwin 1994) (emphasis added).

<sup>102</sup> *See id.* § 2930.02(B).

<sup>103</sup> *Id.* § 2930.14(A) (emphasis added); *see supra* note 8.

<sup>104</sup> OHIO R. EVID. 403(A).

<sup>105</sup> *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

or death, but the judge will impose the actual sentence.<sup>106</sup> Although a judge can override the jury's recommendation to impose the death penalty,<sup>107</sup> the jury's recommendation has a strong impact on a judge's decision. Because of this impact, it is important that the jury not be improperly prejudiced. It may be implicitly understood, however, that Rule 403 will be weighed into the decision of whether to admit this or any type of evidence. If Rule 403 is an automatic prerequisite to admitting a VIS, there is no conflict. Though not definite, this may be the best interpretation of the interplay between the Victims' Rights Act and Rule 403.

### 3. *Payne Does Not Act as a Barrier to Prohibiting Victim Impact Evidence*

The third argument against admitting VISs at capital sentencing hearings is that if O.R.C. section 2930.14 is interpreted so as to exclude VISs during capital sentencing, *Payne* does not mandate their admission. The holding of *Payne* stated "that if the State *chooses* to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar."<sup>108</sup> Therefore, the state must first decide to allow victim impact evidence before *Payne* even applies. If the state statutorily decides not to allow this evidence, *Payne* never needs to be invoked. Whether VISs are constitutional or not would be a moot question. Thus, if VISs are prohibited by statute, they should be inadmissible for that reason alone.<sup>109</sup>

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<sup>106</sup> See *supra* note 11.

<sup>107</sup> OHIO REV. CODE ANN. § 2929.03(D)(3) (Baldwin 1994). If, after the trial jury's recommendation of the death sentence, the court finds, by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors, the court shall impose the death sentence on the defendant. *Id.* If the court does not find that the aggravating circumstances outweigh the mitigating factors, the court will impose a life imprisonment sentence with parole eligibility after either twenty or thirty full years of imprisonment. *Id.* See *supra* text accompanying note 11 for the list of aggravating circumstances.

<sup>108</sup> *Payne*, 501 U.S. at 827 (first emphasis added).

<sup>109</sup> Ohio Rule of Evidence 402, in relevant part, states:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio.

## B. *Victim Impact Statements Permitted by Ohio Statute*

Though several factors suggest that VISs are still prohibited by Ohio statute, there are equally strong, if not stronger, reasons to believe that VISs are now permitted during the sentencing phase of capital offenses. These reasons include: (1) the repeal of O.R.C. sections 2943.041 and 2945.07 indicates that capital sentencing hearings are no longer excepted from admitting VISs;<sup>110</sup> and (2) because the Ohio Supreme Court cited *Payne* as support for admitting VISs in capital sentencing hearings, Ohio has decided to adopt the rationale of *Payne* and allow VISs in capital sentencing hearings.<sup>111</sup>

### 1. *Capital Sentencing Hearings No Longer Excepted from Admitting VISs*

The first argument in support of admitting VISs in capital offense sentencing hearings is found in the statutes the General Assembly chose to repeal. The General Assembly repealed O.R.C. sections 2943.041 and 2945.07.<sup>112</sup> O.R.C. section 2943.041 set forth the rights of crime victims in regard to the prosecution of defendants.<sup>113</sup> O.R.C. section 2945.07 discussed the determination of whether the crime victim or a member of the victim's family were actually present at trial, the recording of that presence, and notices which had to be given to either the victim or the victim's representative family member.<sup>114</sup> Both sections allowed the victim or the victim's representative family member to make a statement regarding the victimization and the sentencing of the offender.<sup>115</sup> These sections applied only when an "indictment or count in the indictment d[id] not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code . . . ."<sup>116</sup> Specifications of aggravating circumstances in an indictment are necessary in a capital offense trial in order to have the option of imposing the death penalty.<sup>117</sup> Therefore, when the General Assembly repealed these statutes, it also repealed the exceptions to admitting VISs at capital sentencing hearings. The legislature then chose not to adopt any exceptions,

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<sup>110</sup> For further discussion, see *infra* part IV.B.1.

<sup>111</sup> For further discussion, see *infra* part IV.B.2.

<sup>112</sup> OHIO REV. CODE ANN. §§ 2943.041, 2945.07 (Baldwin 1993) (repealed 1994).

<sup>113</sup> *Id.* § 2945.041 (repealed 1994).

<sup>114</sup> *Id.* § 2945.07 (repealed 1994).

<sup>115</sup> *Id.* §§ 2943.041, 2945.07 (repealed 1994).

<sup>116</sup> *Id.* (both sections using identical language).

<sup>117</sup> See *id.* § 2929.03(A).



including capital sentencing hearings, in the Victims' Rights Act.<sup>118</sup> This would lead to the conclusion that the Ohio General Assembly intended to repeal the exceptions to reading VISs in capital sentencing hearings. Proponents of admitting VISs in capital offense sentencing hearings assert that for the capital sentencing exception to still exist, the General Assembly could not have known about the capital sentencing exceptions in repealed O.R.C. sections 2943.041 and 2945.07. However, this is an unlikely explanation for such a controversial issue as victim impact evidence.<sup>119</sup>

## 2. Adopting the Rationale of *Payne* in Ohio Courts

The second argument in support of admitting VISs in capital offense sentencing hearings is that Ohio courts have been admitting VISs in capital offense cases since *Payne* was decided. O.R.C. sections 2943.041 and 2945.07 were both repealed under the Victims' Rights Act in July 1994.<sup>120</sup> However, after the decision in *Payne* was handed down in June of 1991, the Ohio Supreme Court admitted victim impact evidence under the authority of *Payne*.<sup>121</sup> This was done in spite of the fact that O.R.C. sections 2943.041 and 2945.07 were still in effect. These sections were effective from June 10, 1987,<sup>122</sup> until the effective date of the Victims' Rights Act, October 12, 1994.<sup>123</sup>

The Ohio Supreme Court's first decision allowing victim impact evidence is found in *State v. Combs*.<sup>124</sup> The defendant in *Combs* was convicted of two counts of aggravated murder and sentenced to death.<sup>125</sup> When arguing for the imposition of the death penalty, the prosecutor speculated as to what the two victims contemplated as they were about to be killed.<sup>126</sup> The prosecutor speculated that the victims thought about how their surviving family members were going to deal with their deaths.<sup>127</sup> By using *Payne* as precedent, the

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<sup>118</sup> See S. 186, 120th General Assembly, Reg. Sess. (1994).

<sup>119</sup> See *supra* note 25 and accompanying text.

<sup>120</sup> See S. 186, 120th General Assembly, Reg. Sess. sec. 2 (1994); see *supra* note 20.

<sup>121</sup> After the decision in *Payne*, but before the effective date of the Act, victim impact evidence was admitted in the following Ohio Supreme Court cases: *State v. Lorraine*, 613 N.E.2d 212 (Ohio 1993); *State v. Evans*, 586 N.E.2d 1042, 1050 (Ohio 1991) (per curiam); *State v. Combs*, 581 N.E.2d 1071 (Ohio 1991).

<sup>122</sup> OHIO REV. CODE ANN. §§ 2943.041, 2945.07 (Baldwin 1993) (repealed 1994).

<sup>123</sup> S. 186, 120th General Assembly, Reg. Sess. (1994).

<sup>124</sup> 581 N.E.2d 1071 (Ohio 1991).

<sup>125</sup> *Id.* at 1075.

<sup>126</sup> *Id.* at 1076-77.

<sup>127</sup> *Id.* at 1076. The prosecutor stated:

*Combs* court stated that "the mention of the victims' personal situations and their relatives did not violate the Constitution."<sup>128</sup> However, this case did not contain the kind of emotional outrage that is so often connected with VISs. The prosecutor was simply speculating as to what was in the victims' minds. There were no heart-wrenching accounts given by family members. The latter type of evidence is at the center of the victim impact evidence controversy, for it is the kind of evidence with the greatest prejudicial potential against defendants.

*State v. Evans*<sup>129</sup> reaffirmed Ohio's judicial position on victim impact evidence.<sup>130</sup> The defendant in *Evans* was sentenced to death for aggravated murder, attempted murder, and aggravated robbery.<sup>131</sup> Defendant Evans asserted that the prosecutor's closing remarks were, in effect, victim impact evidence.<sup>132</sup> These remarks, however, were given during the guilt phase of the trial, not the sentencing phase.<sup>133</sup> As a result, the court held that the prosecutor's comments were merely a "recitation of the facts brought out during the trial, and thus not a victim-impact statement."<sup>134</sup> In dicta, the court stated that even if the comments were considered a VIS, they would not necessarily be inadmissible under the authority of *Payne*.<sup>135</sup> Again, the Ohio Supreme Court avoided the issue of admitting controversial victim impact evidence during sentencing. In *Evans*, the evidence was not considered a VIS.<sup>136</sup>

In its most recent decision addressing VISs in Ohio capital offense sentencing hearings, the Ohio Supreme Court in *State v. Lorraine*<sup>137</sup> again

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"A gun right to your head, was she [Joan] thinking of her husband, who was going to take care of him? . . . What went through her [Peggy's] mind, what was she thinking? Was she thinking of little Joey, who's going to take care of him, grandma is gone, I'm going to be gone, who's going to raise my little boy."

*Id.*

<sup>128</sup> *Id.* at 1077.

<sup>129</sup> 586 N.E.2d 1042 (Ohio 1991).

<sup>130</sup> *See id.* at 1050.

<sup>131</sup> *Id.* at 1048-49.

<sup>132</sup> *Id.* at 1050. The prosecutor stated: "[T]he poignant aspect, when you stop to think about it, a young man watching his mother murdered with 22 stab wounds and crawling under the bed and coming out when the police officers found him saying, 'Don't shoot. I'm only a kid. I'm only a kid.'" *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *See id.*

<sup>136</sup> *Id.*

<sup>137</sup> 613 N.E.2d 212 (Ohio 1993).

upheld the admissibility of victim impact evidence.<sup>138</sup> The defendant in *Lorraine* alleged that the trial court improperly admitted victim impact evidence during both the guilt and sentencing phases of the trial.<sup>139</sup> This evidence consisted of information as to the victims' advanced age, length of marriage, physical weaknesses, and suffering.<sup>140</sup> Other information on individual victims was also admitted.<sup>141</sup> In rejecting allegations that the evidence was victim impact evidence, the court stated, "[f]or the most part, this evidence illustrated the nature and circumstances of the crimes, since the physical condition and circumstances of the victims are relevant to the crime as a whole."<sup>142</sup> The defendant also alleged that the VIS would cause the jury to empathize with the victim.<sup>143</sup> The court, however, stated that in comparison with the defendant's own description of the brutal murders which was read to the jury, the VIS would not be prejudicial.<sup>144</sup> The court cited *Payne* and *Combs* as supporting authority to admit this type of victim impact evidence.<sup>145</sup>

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<sup>138</sup> *Id.* at 218–19.

<sup>139</sup> *Id.* at 218.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* The mental alertness of one victim was admitted as well as the lack of clothing on another victim when found. *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 219.

<sup>144</sup> *Id.* Defendant Lorraine's statement—which was read to the jury—was as follows:

"I knocked on the door, and Doris waved for me to come inside. The door was unlocked, and I went in. Doris was laying [sic] in bed because she is partially paralyzed. Raymond was sitting on his bed which is in the dining room. I told Raymond that I left my necklace upstairs, and he went upstairs with me to look. When we got upstairs, Raymond was in front of me, and I took out the butcher knife from the back of my jeans, and I stabbed Raymond three times in the throat and chest. Raymond was gasping, and then he fell to the floor. I then went back down to the living room where Doris was in bed.

I stood behind Doris, and then I stabbed her about three times in the throat and chest. After I killed Doris, Perry [Postlethwaite] came up from the basement. Perry went upstairs and got Raymond's money from his wallet and came back down. I found about \$83.00 in Doris' sewing basket. Perry then went through a dresser and found a silver ring with diamonds. We then left and got into the stolen Cadillac and drove away."

*Id.* at 215. The court further stated: "According to the statement, after the murders appellant [Lorraine] met friends at a local bar and bought them drinks with money taken from the victims. Appellant also stated that before he murdered the victims, he had burglarized another house in order to steal car keys and a car." *Id.*

<sup>145</sup> *Id.*

A common thread runs through all three of the Ohio Supreme Court decisions. None of the decisions admit victim impact evidence without somehow qualifying that admission. *Combs* did not deal with actual testimony by the victim's family members. It was pure speculation on the part of the prosecutor, of which the jury was fully aware.<sup>146</sup> *Evans* dealt with evidence admitted during the guilt phase of the trial, not during sentencing.<sup>147</sup> Finally, the evidence in *Lorraine* dealt mostly with the "nature and circumstances of the crimes," not with the impact the murders had on family members.<sup>148</sup> Even *Booth* would admit such information.<sup>149</sup> The *Booth* Court stated that the circumstances of a crime were permissible sentencing considerations.<sup>150</sup> Since the evidence in *Lorraine* was considered a part of the circumstances of the crime, the evidence would not offend *Booth*.

Each decision cited *Payne* as authority for admitting the VIS.<sup>151</sup> In all three decisions, however, the Ohio Supreme Court never dealt with the statutory issues involved in admitting this evidence even though O.R.C. sections 2943.041 and 2945.07 were in effect at the time. The court concentrated on constitutional arguments. All appellant briefs were filed before *Payne* was decided and while *Booth* was still precedent.<sup>152</sup> Therefore, all appellants relied on *Booth* as precedent and did not argue the statutory prohibitions against admitting VISs at capital sentencing. As a result, it is uncertain how the Ohio Supreme Court would have decided these cases if such statutory objections were raised.

## V. CONCLUSION

Although the Victims' Rights Act left the status of VISs uncertain in Ohio capital sentencing hearings, it is likely that the General Assembly intended to allow VISs at such hearings.<sup>153</sup> First, by repealing the exceptions for capital

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<sup>146</sup> See *State v. Combs*, 581 N.E.2d 1071, 1077 (Ohio 1991).

<sup>147</sup> See *State v. Evans*, 586 N.E.2d 1042, 1050 (Ohio 1991).

<sup>148</sup> *Lorraine*, 613 N.E.2d at 218-19.

<sup>149</sup> See *Booth v. Maryland*, 482 U.S. 496, 502 (1987), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991).

<sup>150</sup> *Id.*

<sup>151</sup> See *Lorraine*, 613 N.E.2d at 219; *Evans*, 586 N.E.2d at 1050; *State v. Combs*, 581 N.E.2d 1071, 1077 (Ohio 1991).

<sup>152</sup> See *Lorraine*, 613 N.E.2d at 219. The court stated: "Appellant argues that the use of similar victim-impact evidence in the penalty phase violated *Booth v. Maryland*. However, *Payne v. Tennessee* overruled *Booth* after appellant's brief was filed." *Id.* (citation omitted).

<sup>153</sup> The Ohio General Assembly can decide this issue by passing a specific statute on the subject. O.R.C. § 2930.19(D) states: "If there is a conflict between a provision in

offense sentencing,<sup>154</sup> the General Assembly removed the statutory barrier to admitting VISs at the capital sentencing phase. It was very clear that the repeal of these sections, without including a similar exception in the Victims' Rights Act, would place capital sentencing hearings on the same level as all other sentencing hearings so far as VISs were concerned. This was done in light of the U.S. Supreme Court's ruling in *Payne v. Tennessee*,<sup>155</sup> which held that VISs were not per se unconstitutional in capital offense sentencing hearings.<sup>156</sup> The Ohio Supreme Court gave the *Payne* decision great deference. The Ohio high court, on three occasions, stated that VISs would be admissible in capital sentencing hearings.<sup>157</sup> The court held VISs were admissible to the contrary of Ohio statutory law, though this argument was never pursued by defendants.

Given the U.S. Supreme Court's ruling in *Payne*, the Ohio Supreme Court's treatment of VISs in capital offense sentencing hearings and the Ohio legislature's inaction in positively resolving the VIS controversy, it seems that the Victims' Rights Act simply brought statutory law up to date with what Ohio courts were already doing, i.e., admitting VISs in capital offense sentencing hearings.

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this chapter and a specific statute governing the procedure in a capital case, the specific statute supersedes the provision in this chapter." OHIO REV. CODE ANN. § 2930.19 (Baldwin 1994).

<sup>154</sup> *Id.* §§ 2943.041, 2945.07 (Baldwin 1993) (repealed 1994).

<sup>155</sup> *Payne* was decided in 1991, while the Victims' Rights Act was enacted in 1994.

<sup>156</sup> *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

<sup>157</sup> See *Lorraine*, 613 N.E.2d at 218-19; *State v. Evans*, 586 N.E.2d 1042, 1050 (Ohio 1991); *State v. Combs*, 581 N.E.2d 1071, 1077 (Ohio 1991). For analysis of cases, see *supra* part IV.B.2.

